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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 841

HERMAN SCHWABE, INCORPORATED,
PETITIONER,

v.

UNITED SHOE MACHINERY CORPORATION,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAMES M. MALLOY
RICHARD A. SULLIVAN
RALPH WARREN SULLIVAN
Attorneys for Petitioner
10 State Street
Boston 9, Massachusetts

MALLOY, SULLIVAN & MYERSON
Of counsel

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	4
Reasons for Granting the Writ	5
Conclusion	8
Appendix	9

Table of Authorities

Cases

Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251	6
Courtney v. Custer County Bank, 198 F.2d 828	8
Eastman Kodak Co. v. Southern Photo Co., 273 U.S. 359	6
Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416, cert. den. 344 U.S. 837	5
Loew's, Inc. v. Cinema Amusements, Inc., 210 F.2d 86, cert. den. 347 U.S. 976	6
Milwaukee Towne Corp. v. Loew's, Inc., 190 F.2d 561, cert. den. 342 U.S. 909	5
Richfield Oil Corp. v. Karseal Corp., 271 F.2d 709	5, 7
Roche v. New Hampshire National Bank, 192 F.2d 203	8
Story Parchment Co. v. Paterson Co., 282 U.S. 555	6
Swift & Co. v. Morgan & Sturdyvant, 214 F.2d 115	8
Twentieth Century-Fox Film Corp. v. Brookside Theatres Corp., 194 F.2d 846	5
United States v. United Shoe Machinery Corporation, 110 F. Supp. 295, 347 U.S. 521	4, 7
Webb v. Illinois Central R. Co., 352 U.S. 512	8

Page

Wilkerson v. *McCarthy*, 336 U.S. 53 8

William Goldman Theatres, Inc. v. *Loew's, Inc.*, 69 F.Supp. 103, 164 F.2d 1021 5

Statutes

Sherman Act, §2, 15 U.S.C. 2 3

Clayton Act, §4, 15 U.S.C. 15 1, 3

Clayton Act, §5, 15 U.S.C. 16 3, 4

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit in support of the judgment here sought

to be reviewed is not yet reported, but is printed as an Appendix to this petition.

The United States District Court for the Eastern District of New York, on February 27, 1961, entered upon the direction of a verdict dismissing petitioner's complaint under Title 15, U.S.C., §15, and no opinion was entered.

Jurisdiction

The judgment of the Court of Appeals was both dated and entered on January 4, 1962.

The jurisdiction of this Court is invoked under Title 28, U.S.C., §1254(1).

Questions Presented

1. Whether a verdict should be directed for the defendant in a private antitrust action merely because plaintiff's proof of damages might be difficult for the jury to understand and because, in the words of the Court of Appeals, it would be "foolhardy to expect a jury to come up with a rational computation of damages" different from that advocated by plaintiff's expert.

2. Whether, in a suit for damages allegedly due to the defendant's monopolization of the shoe machinery industry, it was proper for the plaintiff to base its claim for damages upon the performance of the parties in the distribution of the same shoe machine type to an outside industry which the defendant did not monopolize.

3. Whether it is proper for a District Court and a Court of Appeals to draw every inference in favor of the movant for a directed verdict.

Statutes Involved

The following statutes of the United States are involved:

A. Section 2 of the Sherman Act [Act of July 2, 1890, c. 647, § 2, 26 Stat. 209; Title 15 U. S. C. § 2] provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . .

B. Section 4 of the Clayton Act [Act of October 15, 1914, c. 323, § 4, 38 Stat. 731; Title 15 U. S. C. § 15] provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

C. Section 5 of the Clayton Act [Act of October 15, 1914, c. 323, § 5, 38 Stat. 731; Title 15, U. S. C. § 16] provides:

> A final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be *prima facie* evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said

laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto . . .

Statement of the Case

Petitioner filed a complaint in the District Court for the Eastern District of New York on May 27, 1957 to recover from respondent damages for injury to petitioner's business by reason of respondent's monopolization of the shoe machinery industry. In its complaint, petitioner relied in part on the fact that the District Court for Massachusetts found that respondent had monopolized the shoe machinery industry. *United States* v. *United Shoe Machinery Corporation*, 110 F. Supp. 295, aff'd. 347 U.S. 521.

After plaintiff presented such evidence as it was allowed to present, the District Court directed a verdict for respondent and entered judgment dismissing the complaint.

Petitioner appealed to the Court of Appeals for the Second Circuit, assigning a number of errors, including the District Court's improper construction and application of Section 5 of the Clayton Act, Title 15, U.S.C., §16, and the District Court's improper exclusion of evidence, particularly with respect to damages.

On January 4, 1962 the Court of Appeals handed down its opinion, in which it declined to rule on the issues raised by petitioner other than the issue as to damages. Solely on the damage issue, the Court of Appeals affirmed the District Court.

The evidence introduced and proffered on the damage issue was this. Petitioner showed that both it and the respondent distributed a clicking machine of the same type to the shoe trade and to the outside trades. (R. 241a-243a, 384a, 450a) Petitioner offered proof that for every year from 1948 to 1959 there were over 17,000 of respondent's

clicking machines in the shoe trade, representing 97% of the clickers in that market. (Ex. for Id. 44, 45, 106, 107; R. 639a, 654a) Petitioner had 571 clickers in the shoe trade. (Ex. 64, 107 Id.; R. 654a) Petitioner showed that there were approximately 10,000 clickers in the outside trades. (R. 452a, 453a, 539a, 540a) Yet the Court of Appeals stated it could find no evidence as to this. (Appendix, p. 495) Of the 10,000 clickers, respondent had only 4,500, or 45% of the outside trade as compared to 97% of the shoe trade. Petitioner had 1,500 clickers in the outside trade. (R. 452a, 453a, 539a, 540a)

Petitioner therefore claimed that but for respondent's monopolization of shoe machinery, it would have gained the same percentage of distribution for its various machine types, 24 in number, in the shoe trade as it obtained for its clickers in the outside trade, namely 15%. The Court of Appeals erroneously held (Appendix 494, 495) that petitioner never competed as to the 24 machine types. (Ex. 61, 62; R. 314a-359a)

Plaintiff proffered expert testimony as to the application of this theory of damages, all of which was excluded. (R. 637a, 638a, 726, 727a; Ex. for Id. 106-114)

Reasons for Granting the Writ

The strictures placed on petitioner's proof of damages by the Court of Appeals is in conflict with decisions of other Circuits. *Richfield Oil Corp. v. Karseal Corp.*, (C.A. 9, 1959), 271 F.2d 709, 713, 714; *William Goldman Theatres, Inc. v. Loew's, Inc.*, (E.D. Pa., 1946) 69 F. Supp. 103, aff'd (C.A. 3, 1948) 164 F.2d 1021; *Milwaukee Towne Corp. v. Loew's, Inc.*, (C.A. 7, 1951), 190 F.2d 561, 566, cert. den. 342 U.S. 909; *Twentieth Century-Fox Film Corp. v. Brookside Theatres Corp.*, (C.A. 8, 1952), 194 F.2d 846; *Kobe, Inc. v. Dempsey Pump Co.*, (C.A. 10, 1952), 198 F.2d 416,

427, cert. den. 344 U.S. 837; *Loew's, Inc. v. Cinema Amusements, Inc.*, (C.A. 10, 1954), 210 F.2d 86, 91, 92, cert. den. 347 U.S. 976. They are also in conflict with decisions of this Court. *Eastman Kodak Co.* v. *Southern Photo Co.*, 273 U.S. 359, 377-379; *Story Parchment Co.* v. *Paterson Co.*, 282 U.S. 555, 561-564; *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264, 265.

The disturbing aspect of the Court of Appeals opinion is its disparagement of the role of the jury in civil anti-trust cases. That Court asserted that because the issues are complex, they are beyond the ken of a jury. Carried to its logical conclusion, this would virtually deny a plaintiff in a private treble damage action the right to a jury trial.

The ruling here places an undue burden, not on the wrongdoer, but on the wronged.

It reaches a result directly contrary to this Court's expression in *Bigelow*, *supra*, where this Court said, at pp. 264, 265:

> In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on the relevant data, and render its verdict accordingly. In such circumstances 'juries are allowed to act upon probable and inferential, as well as direct and positive proof.' *Story Parchment Co.* v. *Paterson Co.*, supra, 564; *Eastman Kodak Co.* v. *Southern Photo Co.*, supra, 377-9. Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of dam-

ages uncertain. Failure to apply it would mean the more grievous the wrong done, the less likelihood there would be of recovery.

The position of the Court of Appeals is that a plaintiff in an antitrust suit must be confined to the monopolized market to measure its damages. This is especially invalid where, as here, the market has been monopolized by respondent for so many years. *United Shoe, supra.* In such a case, it is impossible for plaintiff to show earning before the monopoly arose. Moreover, inasmuch as the monopoly has not been fully dissipated, earnings after the monopoly may be a less valid guide than the outside market theory.

It was therefore proper for petitioner to show that when petitioner met respondent with the same machine in a competitive field, petitioner did substantially better than in the monopolized shoe trade.

The Court of Appeals refusal to recognize the soundness of this damage theory places it in conflict with the decision of the Ninth Circuit in *Richfield, supra*, pp. 713-714, which held that plaintiff could look to an outside market to prove its damages.

Even if petitioner might have shown damages by means of the waxing and waning theory endorsed by the Court of Appeals, it should not have been precluded from using the outside market comparison as an alternative.

Finally, it is patent from reading the opinion of the Court of Appeals, that it drew every inference in favor of respondent, the movant for a directed verdict. As shown in the statement of facts, the Court of Appeals even ignored evidence introduced by petitioner as to size of the outside clicker market, and as to petitioner's distribution of various makes of machines to the shoe trade. The Court of Appeals thus offended the principle recognized by this Court and appellate courts generally, that on a motion for a di-

rected verdict, the evidence must be viewed in the light most favorable to the party against whom the motion is directed. *Wilkerson* v. *McCarthy*, 336 U.S. 53, 57; *Webb* v. *Illinois Central R. Co.*, 352 U.S. 512-514; *Roche* v. *New Hampshire National Bank*, (C.A. 1, 1951) 192 F.2d 203; *Swift & Co.* v. *Morgan & Sturdevant*, (C.A. 5, 1954) 214 F.2d 115; *Courtney* v. *Custer County Bank*, (C.A. 9, 1952) 198 F.2d 828.

Conclusion

Based on the foregoing, the writ should be granted.

Respectfully submitted,

JAMES M. MALLOY
RICHARD A. SULLIVAN
RALPH WARREN SULLIVAN
Attorneys for Petitioner
10 State Street
Boston 9, Massachusetts

MALLOY, SULLIVAN & MYERSON
Of counsel

Appendix

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HERMAN SCHWABE, INC.,
Plaintiff-Appellant,

—v—

UNITED SHOE MACHINERY CORPORATION,
Defendant-Appellee.

Before:

SWAN, WATERMAN and FRIENDLY,
Circuit Judges.

Plaintiff appeals from a judgment of the District Court for the Eastern District of New York, Walter Bruchhausen, *Chief Judge*, entered upon the direction of a verdict, dismissing plaintiff's complaint, under 15 U. S. C. 15, for injury arising from violations of the antitrust laws. FRIENDLY, *Circuit Judge*:

Plaintiff, a New York corporation having its principal place of business in Brooklyn, was organized in 1939 to manufacture shoe machinery, and to distribute in interstate commerce shoe machinery made by itself or by others, primarily European manufacturers. By its complaint, filed in the District Court for the Eastern District of New York on May 27, 1957, it sought to recover from defendant United Shoe Machinery Corporation, a New Jersey corporation having its principal place of business in Boston, threefold damages for the entire period since plaintiff's organization, for injury to its "business or property by reason of anything forbidden in the antitrust laws," as provided in § 4 of the Clayton Act, 15 U. S. C. 15. The complaint charged that defendant had monopolized trade

or commerce in a manner forbidden by §2 of the Sherman Act, 15 U. S. C. §2, as found by the District Court for Massachusetts in a suit in equity, *United States* v. *United Shoe Machinery Corporation*, brought by the Government in 1947, and decided by that court in 1953 and by the Supreme Court in 1954. We have previously affirmed an order granting defendant's motion, under the statute of limitations added to the Clayton Act by the Act of July 7, 1955, 69 Stat. 283, 15 U. S. C. §15b, for summary judgment as to all damages accrued before May 27, 1953, *Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.*, 274 F. 2d. 608 (2 Cir.), cert. denied, 363 U. S. 811 (1960).

At the end of a trial lasting some nine court days, Chief Judge Bruchhausen directed a verdict for defendant and entered judgment dismissing the complaint. Appellant complains not only of the direction of the verdict but of a number of other rulings. Among these are what is claimed to have been an undue restriction of plaintiff's right, under §5 of the Clayton Act, 15 U. S. C. §16, to rely on the decree in the Government's suit as prima facie evidence; the treatment of a provision of the decree providing for United's sales of machines previously leased as if this granted anti trust immunity; the exclusion of evidence of alleged acts of monopolization which antedated May 27, 1953, but which, appellant claims, continued to have an effect thereafter; failure to require United to produce certain documents which, appellant urges, would have aided its endeavor to explain away testimony by Mr. Schwabe, its president and sole stockholder, before a grand jury that had been investigating United's business practices in 1947 just prior to the filing of the Government's equity suit,[1] and to miti-

[1] In this testimony Mr. Schwabe said, *inter alia*, to the apparent surprise of the Government, that certain machines he had imported from Germany in the early years of his business "did not compare with the United Machines"; that United's Ensign lacer was faster than the

gate the effect of its answer to a Government questionnaire in 1948;[2] the exclusion, as hearsay, of written and oral statements from potential customers; and the exclusion of expert testimony as to damages and various exhibits tendered in connection therewith. Counsel indicated that decision by us as to all these rulings would be welcome since the same issues have arisen, or are likely to arise, in a treble damage suit by a different plaintiff in the District of Massachusetts in which the same attorneys are currently engaged, although any decision by us could have no binding effect on that court. We do not find it appropriate to rule expressly on any of these points save the two last mentioned, since, in our view, plaintiff failed to present evidence of damage sufficient to warrant submission to the jury, and any errors with respect to other elements of the case were therefore not prejudicial.

The economic background is so fully yet (considering its complexity) succinctly set out in Judge Wyzanski's admirable and much admired opinion, *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), aff'd *per curiam*, 347 U. S. 521 (1954), as to relieve us of need for any but the most summary statement. The court there found that United had acquired control of the shoe machinery market, in which it had attained a "75 plus-percentage," by three principal means, the first two of which were innocent and the third not. These were "the

Albacko lacing machine sold by him; that the Meaus welt sewing machine which he distributed was "About half as slow" as the competing United product; and that "we just can't make more machines, but they [United] don't limit us." Appellant contends that the documents not produced would corroborate Mr. Schwabe's claim that he gave this testimony at United's request and because of fear.

[2] This had given negative answers to such questions as "Have you encountered any selling practices by USMC which have been detrimental to your business?", "Have USMC's practices in enforcing its lease agreements with shoe manufacturers operated to hinder your company's business?", and "Has any other action by USMC hindered your company's business?"

original constitution of the company," approved in *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32 (1918); "the superiority of United's products and services"; and "the leasing system," as to which the court particularly mentioned "the 10-year term, the full capacity clause, the return charges, and the failure to segregate service charges from machine charges," as well as the aid the leasing device gave "United in maintaining a pricing system which discriminates between machine types." 110 F. Supp. at 343-344. The Court's decree, dated February 18, 1953, found generally that United had violated §2 of the Sherman Act "by monopolizing the shoe machinery trade and commerce among the several States" and specifically that "All leases made by defendant which include either a ten-year term, or a full capacity clause, or deferred payment charges, and all leases under which during the life of the leases defendant has rendered repair and other service without making them subject to separate, segregated charges, are declared to have been means whereby defendant monopolized the shoe machinery market." The decree provided that "after A Day" defendant should not offer any machine type for lease unless it also offered the same for sale and should not make any leases save on meeting certain conditions therein defined [3] and that "before B Day" defendant should present plans for terminating all outstanding leases and for disposing of certain parts of its business other than the manufacture of shoe machinery. Ultimately "A Day" was fixed as January 1, 1955, and "B Day" as April 1, 1955.

As the statutory language suggests, recovery under sec-

[3] Among these were that the term should not exceed five years; that the lessee should have the right to return after one year on payment of certain charges which in no event should discriminate on account of the substitution of a competitive machine; that there be no "full capacity clause" or "right of deduction fund"; and that service charges after 30 days from installation shall be "separate and reasonable." 110 F. Supp. at 352-353.

tion 4 of the Clayton Act, as under its predecessor, 7 of the Sherman Act, 26 Stat. 209, 210 (1890), "cannot be had unless it is shown, that, as a result of defendants' acts, damages in some amount susceptible of expression in figures resulted." *Keogh v. Chicago & N. W. Ry. Co.*, 260 U. S. 156, 165 (1922).[4] Although later Supreme Court decisions have made it plain that "a defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible," *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359, 379 (1927); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931), and that "the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly," *Bigelow v. RKO Radio Pictures, Inc.*, 327 U. S. 251, 264 (1946), none has detracted from Mr. Justice Brandeis' statement in *Keogh* or held "that mere proof that a defendant has injured its competitor generally warrants recovery in the absence of evidence that would justify a

[4] Although certain cases have awarded or indicated the possibility of awarding nominal damages under §4 of the Clayton Act, e.g., *Pennsylvania Sugar Refining Co. v. American Sugar Refining Co.*, 166 Fed. 254, 260 (2 Cir. 1908) (dictum in opinion reversing dismissal of complaint); *United Exhibitors, Inc. v. Twentieth Century-Fox Film Distributing Corp.*, 31 F. Supp. 316 (W. D. Pa. 1940); *Siegried v. Kansas City Star Co.*, 193 F. Supp. 427 (W. D. Mo. 1961); cf. *Elgin Corp. v. Atlas Building Products Co.*, 251 F.2d 7, 12 (10 Cir.), cert. denied, 357 U. S. 926 (1958), this seems dubious in the light of the language of the statute and the Supreme Court opinions. For opinions pointing against such an award, see *Burnham Chemical Co. v. Borax Consolidated, Ltd.*, 170 F.2d 569, 578 (9 Cir. 1948), cert. denied, 336 U. S. 924 (1949); *Turner Glass Corp. v. Hartford-Empire Co.*, 173 F.2d 49, 51-52 (7 Cir.), cert. denied, 338 U. S. 839 (1949); *American Can Co. v. Russellville Canning Co.*, 191 F.2d 38, 54-55 (8 Cir. 1951); *Wolfe v. National Lead Co.*, 15 F. R. D. 61, 63 (N. D. Calif. 1953), aff'd after trial, 225 F.2d 427 (9 Cir.), cert. denied, 350 U. S. 915 (1955); *Elyria, Lorain Broadcasting Co. v. Lorain Journal Co.*, 1960 Trade Cases ¶69,831 (N. D. Ohio 1960); *Dela*

finding of injury to the particular plaintiff and would supply a rational basis for approximating its amount. To the contrary, "the jury may not render a verdict based on speculation or guesswork," *Bigelow v. RKO Radio Pictures, Inc.*, 327 U. S. at 264.

The gist of appellant's case on liability was that until "A Day," i.e., January 1, 1955, United continued to make the "Form A" lease the decree had found unlawful and that the effects of United's previous monopolization persisted thereafter, not only because many of the Form A leases continued until replaced by the new form, but on the broader ground that customers who had leased United machines under the old form would retain them under new leases or purchases. We need not question the validity of this as a legal theory; as said in *William H. Rankin Co. v. Associated Bill Posters*, 42 F. 2d 152, 155 (2 Cir.), cert. denied, 282 U. S. 864 (1930), "The decree could not as a matter of law, and especially not in the face of evidence showing the contrary, be held to have done away with all continuing damage directly traceable to the defendants' former unlawful interference." However, evidence that de-

ware Valley Marine Supply Co. v. American Tobacco Co., 184 F. Supp. 440, 449 (E. D. Pa. 1960). There is no general principle in torts, as there is in contracts, that nominal damages may always be awarded if wrong-doing has been proved. McCormick, Damages (1935), §22, explains that in trespass the rule was always that proof of the defendant's wrongdoing alone entitled plaintiff to nominal damages; that as tort law expanded through the action on the case, "it was established that a vital and necessary element of the plaintiff's case was a showing of actual loss or detriment to him flowing from defendant's wrongful conduct"; that still more recently a fission had occurred, with some actions in "case" requiring proof of damage as an element of the injury and others not; and that "In actions upon claims created solely by statute, the terms of the particular statute are controlling upon the question of whether the actions lie for nominal damages only, there being no proof of actual loss or damage." Whatever the rule as to the reversal of a judgment solely for erroneous failure to award nominal damages may be, see 1 Sedgwick, Damages (9 ed. 1913), §109 at p. 189; 1 Sutherland, Damages (4 ed. 1916), §41 at pp. 40-41, appellant has not sought reversal on this score.

fendant had unlawfully placed obstacles in the way of competition generally, and that these continued in some measure during the damage period, would not meet plaintiff's burden of proving "damages in some amount susceptible of expression in figures," as the two plaintiffs in *Rankin* had done by showing that profitable licenses had been unlawfully terminated and offering, in one instance, a history of previous profits and, in the other, such a history supplemented by an estimate, derived therefrom, of profits that would have been likely but for the termination. See *Baush Machine Tool Co.* v. *Aluminum Co. of America*, 79 F. 2d 217, 227 (2 Cir. 1935).

Plaintiff's theory here was not that acts by defendant had unlawfully deprived it of something it previously possessed. It could not well have been so, since there was nothing to indicate that defendant's conduct had changed for the worse during the damage period or, indeed, since plaintiff was organized, and plaintiff's original investment of $10,000 had produced an earned surplus of over $300,000 by 1961, after substantial salary payments to Mr. Schwabe, its sole stockholder, and dividends. Plaintiff's evidence, therefore, was necessarily directed to attempting to show how defendant had unlawfully deprived it of business it might otherwise have secured. It was entirely competent for plaintiff to seek to show this. *William Goldman Theatres, Inc.* v. *Loew's, Inc.*, 69 F. Supp. 103, 107 (E. D. Pa. 1946), aff'd, 164 F. 2d 1021 (3 Cir.), cert. denied, 334 U. S. 811 (1948); the trouble was that, unlike the plaintiff in the cited case, it failed to present evidence from which a jury might approximate its loss.

Although, because of defendant's long domination of the market, plaintiff could not show how sales and profits once realized in a free market had diminished, no reason is seen why it could not have proceeded in the opposite direction, by showing how its sales and profits had waxed as

United's unlawful practices had waned. Compare *Twentieth Century-Fox Film Corp.* v. *Brookside Theatre Corp.*, 194 F. 2d 846, 854-856 (8 Cir.), cert. denied, 343 U. S. 942 (1952). Granting that the relief in the Government's suit, decreed in the main to be effective January 1, 1955, would only "gradually diminish the magnetic hold" of *United*, 110 F. Supp. at 350, the influence of the practices found unlawful ought surely to have lessened by the time of the instant trial in 1961; we cannot assume that such an elaborate decree, fashioned by an able District Judge after exceptionally thorough study of the industry, and approved by the Supreme Court, would have totally failed to accomplish its objectives in six years. However, plaintiff did not elect to follow any such method of proof—which, obviously enough, ought to have led to a gradual tapering off of damages during the period—but instead chose a very different one we shall now summarize.

Plaintiff's damage evidence was offered through an economist, Peter Max. His first step was to determine the number of United clicking machines outstanding both in the shoe industry and in the non-shoe industry for each fiscal year ending in February, 1939-1959.[5] He next determined Schwabe's share of the clicking machines in the non-shoe field for each year 1939-1960 on the assumption that the total number of such machines outstanding in each year was 10,000. Two further tabulations showed the average number of each of 24 types of United machines outstanding in each year 1954-1959, and the average annual revenue from each; these enabled Max to estimate United's machine revenues for each type of machine for each year. He then applied to these revenue figures a percentage, 15.54%, which was Schwabe's cumulative share of the assumed 10,000 non-shoe clicking machines in 1956; the sum of the

[5] For example, he computed the United clicking machines in the shoe industry in 1953 as 18,495 and in the non-shoe as 4,154.

products was alleged to be the shoe machine revenues Schwabe would have realized during the six years but for United's illegal acts. This sum was then multiplied by 19.81%, Schwabe's ratio of pre-tax earnings to sales in 1946; the product, $2,777,956, was alleged to represent what shoe machine pre-tax earnings Schwabe would have realized during the six years but for United's illegal acts. Deduction of Schwabe's pre-tax earnings of $195,475, left a balance of $2,582,481; this was claimed to be Schwabe's damages, to be trebled. Max' conclusions were further presented in a series of charts and graphs.

The judge properly excluded this evidence. No basis had been established for the assumption that but for United's unlawful acts Schwabe's proportion, not only of clicking machines in the shoe market, but of each and every type of shoe machinery marketed by United, would have approximated in the six years, 1954-1959, the 15.54% asserted to represent Schwabe's 1956 share of the clicking machines in the non-shoe market. Even as to clicking machines, there was no evidence that United had made the same effort or had the same ability to penetrate the non-shoe market as had created the lawful extent of its power in the shoe market, or that, but for United's unlawful efforts in the latter, Schwabe would have made the same efforts, or would have had the same ability, to penetrate the shoe market that it had in the non-shoe market. The lack of evidence was the more serious because it is undisputed that among the factors accounting for United's large share of the shoe machinery market, both past and present, many were entirely lawful: United's offer of "a long line of machine types, while no competitor offers more than a short line," and "its understanding of the techniques of shoemaking and the need of shoe manufacturers, its efficient design and improvement of machines, and its prompt and knowledgeable service," 110 F. Supp. at 343-344. There was no showing that these

factors existed in the non-shoe clicking machine field to anything like the same degree; indeed, plaintiff's own figures that in the year ended Feb. 28, 1959, the fourth year in which the decree was effective, Schwabe's share of the combined United-Schwabe clickers was only 3% in the shoe industry as against 41% in the non-shoe rather indicated that some factors other than illegal monopolization were at work, even as to clickers. All these defects were compounded when Schwabe's alleged non-shoe clicking percentage was applied to other machines. There was no showing either that Schwabe ever had competed, or even that but for United's unlawful acts it would have competed, as to all the 24 types; further, the evidence made it plain that as to some types with respect to which it had competed the Schwabe product was higher in cost or lower in quality or delivery terms.

Beyond this basic defect there were others; we shall mention two. If any basis was provided for Max' assumption that the outstanding non-shoe clicker machines numbered approximately 10,000, we have not found it. The use of the 19.81% of sales carried down to pre-tax profits by Schwabe in 1946, was quite indefensible; this was by all odds the highest ration of profits to sales ever experienced by Schwabe, the next highest being 11.14% in 1950, and *nearly six times the average, 3.3%, during the years 1954-1959* for which damages were being computed.[6]

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[6] In 1959 and 1960, the fourth and fifth years after the decree in the Government suit had become effective, Schwabe's ratios of pre-tax profits to sales were 3.33% and 3.82%.

The figures, also excluded by the court, showing Schwabe's pre-tax profits for years before and after the decree had become effective, likewise furnished no basis from which a jury could make an award of damages. These were, in each case for the years ending September 30:

1952	$39,671
1953	39,962
1954	49,672
1955	27,330

There is no bright line that divides evidence worthy of consideration by a jury, although subject to heavy counter-attack, from evidence that is not. Especially because of the guaranty of the Seventh Amendment, a federal court must be exceedingly careful not to set the threshold to the jury room too high. Yet it is the jury system itself that requires the common law "judge, in his efforts to prevent the jury from being satisfied by matters of slight value, capable of being exaggerated by prejudice and hasty reasoning . . . to exclude matter which does not rise to a clearly sufficient degree of value"; "something more than a minimum of probative value" is required. 1 Wigmore, Evidence (3d ed. 1940), pp. 409-410. These comments are especially pertinent to an array of figures conveying a delusive impression of exactness in an area where a jury's common sense is less available than usual to protect it. It might indeed have been possible for a judge, with days in which to study the exhibits of plaintiff's expert, to come up with some rational computation of damages, on a theory wholly different from what the expert advocated, that would satisfy the Supreme Court's modest requirements in this area;[7] it would be foolhardy to expect a jury to do so. "When the risk of confusion is so great as to upset the balance of advantage,

1956	33,063
1957	25,568
1958	1,981
1959	49,975
1960	65,442

Plainly there is no correlation with the effective date of the decree. It may also be noted that Max' method produced the illogical result of showing an increase in damages from $377,851 for the fiscal year 1954, before the decree had become effective, to a peak of $467,211 in 1958 and a figure of $443,940 in 1959.

[7] For example, plaintiff's figures showed that its proportion of the outstanding United-Schwabe shoe clickers had risen rather steadily, from 2.3% in 1954 to 3.1% in 1959. It might not be irrational to conclude that in a free market plaintiff would have had at least the latter proportion of the clicker shoe machinery business throughout the damage period, and to estimate constructive sales and profits on that

the evidence goes out," *Shepard* v. *United States*, 290 U.S. 96, 104 (1933).

These principles required exclusion; the leap required to derive any rational conclusion from the expert's data was too great to allow a jury to take. Many decisions have rejected evidence of injury and damages comparable in weight with that submitted here. *Bausch Machine Tool Co.* v. *Aluminium Co. of America*, *supra*; *Momand* v. *Universal Film Exchanges, Inc.*, 172 F. 2d 37, 43-44 (1 Cir. 1948), cert. denied, 336 U.S. 967 (1949); *Emich Motors Corp.* v. *General Motors Corp.*, 181 F. 2d 70, 83-84 (7 Cir. 1950), rev'd on other grounds, 340 U. S. 558 (1951); *Wolfe* v. *National Lead Co.*, 225 F. 2d 427, 433-434 (9 Cir.), cert. denied, 350 U. S. 915 (1955); *Flintkote Co.* v. *Lysfjord*, 246 F. 2d 368, 392-394 (9 Cir.), cert. denied, 355 U. S. 835 (1957); *Clapper* v. *Original Tractor Cab Co.*, 270 F. 2d 616, 630-634 (7 Cir. 1959); cert. denied, 361 U. S. 967 (1960); *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 284 F. 2d 1, 32-34 (9 Cir. 1960); *Siegfried* v. *Kansas City Star Co.*, 193 F. Supp. 427, 436-437 (W. D. Mo. 1961). In the Supreme Court cases earlier cited, the plaintiffs not only had shown defendants' wrongful acts but had presented "evidence of the decline in prices, profits and values, not shown to be attributable to other causes," which warranted the jury's concluding "that defendants' wrongful acts had caused damage to the plaintiffs." *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. at 264. In *Richfield Oil Corp.* v. *Karseal Corp.*, 271 F. 2d 709 (9 Cir. 1959), cert. denied, 361 U. S. 961 (1960), relied on by appellant, the plaintiff

basis; indeed, a person expert in statistical analysis might have been able to construct trend lines that would support a higher proportion. However, any such calculation would be quite beyond the powers of a jury, even if it had been suggested. Moreover, the results would have been only a modest fraction of those given by plaintiff's expert even for clickers, and the record did not afford even that much of a basis for a calculation as to other items.

offered evidence that its product, which had been denied access to defendant's service stations, had outsold a competing product in other service stations of the same sort; the similarity of the markets was there proved, as in many of the motion picture theatre cases, and the opinion distinguished the *Wolfe* and *Flintkote* cases in the same circuit, which we have previously cited.

Even though plaintiff's general proof of damage was thus properly excluded, a verdict should not have been directed against it if it had proved that defendant's unlawful acts had caused the loss of specific sales and had shown the damage therefrom. This it likewise failed to do.

Mr. Schwabe testified that in 1952 he had negotiated for the sale of clicking machines to Endicott-Johnson. A machine had been installed on trial, and Schwabe had drafted a contract for the sale of 850 over a ten year period.[8] The contract was not signed; Schwabe did not say why. In April, 1954, in the course of a written inquiry as to Endicott-Johnson's decision on a high speed roughing machine, he noted that "Two years have passed since we made the proposal on the clicking machines" and asked "Do you think this matter can be revived again?" The purchasing agent answered that the roughing machine "did not prove very successful," that "As to the clicker, I do not know today what the answer is and we have not entirely forgotten them," but that "One thing we would be interested in if you had a twin clicker which would compare with the USMC machine." There the story ends. Clearly it permitted no inference that sales to Endicott-Johnson had been lost due to United's unlawful acts; if any inference could be drawn, it would be rather that Endicott-Johnson was quite receptive to competing products as good as United's.

[8] Delivery was to be at the rate of 85 machines per year at a price of $1100 per machine; this included a profit margin of some $250.

Appellant also sought to introduce letters from five shoe manufacturers and a conversation with a sixth, ranging over a six and a half year period, which we summarize in the margin;[9] the judge excluded these are hearsay. Appellant says this was error since the letters and conversation came within the hearsay exception for declaration of a motive or reason, 6 Wigmore, Evidence (3d ed. 1940), §1729 (2). Statements of a customer as to his reasons for not dealing with a supplier are admissible for this limited pur-

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[9] Letter dated Oct. 1, 1953, from Tex Tan of Yoakum expressing interest in a cementing machine and a back seam rubbing machine: "In reference to the clicking machines, we have done nothing. We are still going along with the USMC machines on a lease basis. Possibly some day we may get around to outright purchase of clickers, and discontinue paying the monthly rentals. When we do, we will be glad to give you a chance to p[illegible] some of your machines in our shop."

Letter dated Dec. 17, 1954, from Bachman Shoes, Inc., asking for "a price list of the various machines you have as we feel we could use this to good advantage in changing over to your machines as the leases on our United Machines expire."

Letter dated Jan. 17, 1955, from Enterprise Shoe Company, asking for cost information in order to be able to compare this with United's "at the time they have their final figures available."

Letter dated March 6, 1956, from Florsheim Shoe Company, stating it had purchased "every one" of its insole channeling machines "and our cost on these machines was considerably under $500.00 average. In view of this, we would not be interested in the purchase of additional machines unless there was a decided improvement in these machines and the price warranted this." The price of the Schwabe machine, sold new, was $1200.

Letter dated May 6, 1960, from Allegro Shoe Corporation, stating it had tested appellant's splitting machine, which had been found to have "certain advantages, but it definitely doesn't justify the difference of $700.00, since we can purchase the machine from United Shoe that we have presently f[illegible] $1473.76 * * * Compared to all the other machines on the market, with the exception of the old United machine, it definitely would be our choice if we ever replace the machine that we have, or require a second one."

In addition, Mr. Schwabe was prevented from stating "what reasons were given to you by Selby Shoe Company for their refusal to take your machines?" in 1955; no offer of proof was made, as F. R. Civ. Proc. 43(c) requires.

pose,[10] *Laudor v. Loewe*, 235 U. S. 522, 536 (1915); *Greater New York Live Poultry C. of C. v. United States*, 47 F. 2d 156, 159 (2 Cir.), cert. denied, 283 U. S. 837 (1931), although not "as evidence of the facts recited as furnishing the motives." *Buckeye Powder Co. v. E. I. du Pont de Nemours Powder Co.*, 248 U. S. 55, 65 (1918). However, the Supreme Court said in the *Buckeye* case: "We should be slow to overthrow a judgment on the ground of either the exclusion or admission of such statements except in a very strong case." *Ibid.* The case here was anything but that. Although the excluded statements may have shown that some effects of United's monopoly persisted, they did not show what damage, if any, Schwabe had suffered therefrom. On the other hand, to the extent that the excluded statements showed that Schwabe's opportunity to compete with United for the business of these manufacturers had been improved, in an indeterminate degree, by the various steps the District Court had directed United to take, appellant made no offer of proof that this improved position had ultimately resulted in sales to these six manufacturers, thereby permitting an inference that similar sales would have been made earlier but for United's monopolization;

[10] Even as to this the trial judge should have some discretion in view of the risk of insincerity in a potential customer's statement why products were not being ordered. It should not be forgotten that the basis for admitting statements of mental or physical condition even from declarants not unavailable, is that later, testimonial utterances "where there is ample opportunity for deliberate misrepresentation and small means for checking it by other evidence or testing it by cross-examination, are comparatively inferior to statements made at times when circumstances lessened the possible inducement to misrepresentation," 6 Wigmore, Evidence (3 ed. 1940), p. 58; it may be doubted how fully these considerations apply to statements of the sort under review. On the closely related subject of the use of declarations of intention to prove a future act, the Supreme Court of California requires that the declaration "must have been made under circumstances which naturally give verity to the utterance," *People v. Alcalde*, 24 Cal. 2d 177, ——, 148 P. 2d 627, 632 (1944). See *United States v. Annunziato*, 293 F.2d 373, 377-378 (2 Cir. 1961).

if United still kept the business or if it went to others, then this might equally have occurred for innocent causes during a period of monopolization. Still less did appellant offer to prove the amount of sales to these manufacturers or the profit thereon. Admission of the manufacturers' statements thus would not have cured the vital flaw in appellant's case—its failure to proffer any evidence permitting the jury to make a rational determination of its damages.

Affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 841

HERMAN SCHWABE, INCORPORATED,
Petitioner

v.

UNITED SHOE MACHINERY CORPORATION,
Respondent

RESPONDENT'S BRIEF OPPOSING CERTIORARI

THEODORE KIENDL
RALPH M. CARSON
Attorneys for Respondent
1 Chase Manhattan Plaza
New York 5, N. Y.

ROBERT D. SALINGER
LOUIS L. STANTON, JR.
Of Counsel

April 12 1962

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HERMAN SCHWABE, INCORPORATED, *Petitioner*, v. UNITED SHOE MACHINERY CORPORATION, *Respondent*.	No. 841

RESPONDENT'S BRIEF OPPOSING CERTIORARI

Petitioner seeks by its statement of Questions Presented to raise a single point in relation to the adequacy of its proof of damages upon the trial, whereas the record discloses that judgment was entered at the trial upon a directed verdict which dismissed the complaint on a variety of grounds (R. 767a-73a).

The petition, taking no account of the several grounds of dismissal, fails to comply with Rule 19 of this Court. The decisions of Federal courts of appeals on the application of the rule of damages on various states of fact, which petitioner alludes to, do not show a conflict among the circuits because of the great disparity of the factual situations in the several cases. No Federal question was decided by the Court of Appeals here in a way conflicting with applicable decisions of this Court; indeed the opinion of Judge Friendly, 297 F. 2d 90, carefully observes the precepts of the cases on antitrust damages in this Court. No question of construction of a Federal statute is involved.

In more detail, the record discloses the following grounds for denial of the writ:

1. The question of damages here presents no important point of law and was rightly decided.

Petitioner seeks to make it appear that the Court of Appeals decision unduly disparages the role of a jury in civil antitrust cases (pet. 6) and that it drew every inference in favor of respondent (pet. 7).

These criticisms are most unjust to the very careful opinion of Judge Friendly which acknowledged that a Federal court must be careful not to set the threshold to the jury room too high (pet. 19) and honored the precept by a discriminating view of the evidence. The Court of Appeals well pointed out that the very nature of a jury trial (here of course invoked by petitioner) requires that this group of laymen be protected from "an array of figures conveying a delusive impression of exactness in an area where a jury's common sense is less available than usual to protect it" (pet. 19).

Here the really chimerical theory of damages presented by petitioner is illustrated by the series of assumption upon assumption which it involved. These assumptions were (a) that the percentage of petitioner's business in clicking machines obtained in the non-shoe trade (the so-called "outside trade") in 1956 was the percentage which would have obtained in the shoe machinery business under competitive conditions; (b) that the total amount of clicking machines outstanding in non-shoe industries was 10,000; (c) that petitioner's 15.54% share in the non-shoe trade represented by its proportion of clickers against the assumed 10,000, represented also the share of clicking machines and 23 other shoe machinery types which petitioner would under competitive conditions have distributed in the shoe trade; (d) that petitioner was entitled to take as its profit norm in computing profits which it would have made on the assumed distribution of these 24 types in 1953-7 the 19.81% which it made on clicking machines only in its best year 1946;

and (e) that accordingly petitioner was entitled to a 15.54% participation in respondent's actual profits upon respondent's distribution of the 24 machine types in 1954-9.

Such a claim for lost profits seems even more extreme than those which have been dismissed by the courts of appeals of other circuits: *Baush Machine Tool Co.* v. *Aluminum Co. of America* 79 F. 2d 217 (CA 2 1935), cert. denied 293 US 589; *Flinkote* v. *Lysfjord* 240 F. 2d 308 (CA 9 1957), cert. denied 355 US 835; *Beacon Fruit & Produce Co., Inc.* v. *H. Harris & Co., Inc.* 260 F. 2d 958 (CA 1 1958), cert. denied 359 US 984.

Judge Friendly clearly pointed out the error of Schwabe's various assumptions. He called attention to the lack of basis for the assumption of a 10,000 clicker population in the non-shoe trade (pet. 18). Petitioner cites for the figure of 10,000 R. 452a, 453a, 539a, 540a (pet. 8). Reference to these pages shows only the vaguest support for a figure of 10,000. R. 452a attributing 1,500 outside trade clickers to Schwabe, more to respondent in the ratio of three-to-one, "a few less" to Rapid, "a lot less" to Hamlin, "a lot less" to Fales and Reese, "a few" to Amco, and to Bata "about the same as Hamlin". The other references are to colloquy of counsel on a different point, giving no figures whatever. The aggregation of these guesses into "10,000" can be only an assumption, as petitioner's expert called it (R. 644a). The rickety structure of ambitious surmises erected on such a foundation could not but be rejected by the Court of Appeals, as it was by the District Court in directing a verdict.

It may be noted in passing that *Richfield Oil Corp.* v. *Karseal Corp.* 271 F. 2d 709 (CA 9 1959), cited at pet. 7 for the proposition the petitioner may look to an outside market to prove damages, is in no way comparable. The outside market called in *Richfield* the free market, was commerce in waxes and polishes which was identical throughout

the field, except that defendant Richfield Oil Corporation was accused of having excluded plaintiff's product by exclusive dealing arrangements. Except for the restriction, there was entire parity of conditions between the free and the restricted market. Here the outside or non-shoe trade utilizes machinery for camera cases, handbags, holsters, belts, gloves, and all manner of goods requiring simpler and less complicated operations than does shoe manufacture. The degree of penetration of the non-shoe trade by a manufacturer of a simple type of machine like clickers, might well be different from its success in the shoe trade where pulling-over, assembling, and other complex machines made by the respondent were peculiarly called for. In other words, as Judge Friendly well pointed out, the difference here between the outside trade and the shoe trade was not exclusively a difference between what petitioner calls non-competitive as against competitive conditions. It was a difference between markets essentially non-comparable.

2. The case below was determined by many other deficiencies in petitioner's proof.

The deficiency in petitioner's proof of damages was only one part of the case below. A basic reason for the directed verdict was petitioner's failure to call a single direct witness in support of its claim of monopolistic and restrictive practices in the relevant period 1953-7, respondent having procured summary judgment which limited the issues to that period *Herman Schwabe, Inc.* v. *United Shoe Machinery Corporation* 274 F. 2d 608, cert. denied 363 US 811. The record in this period was far different from that in the 1922-51 period dealt with by Judge Wyzanski's judgment in *United States* v. *United Shoe Machinery Corporation* 110 F. Supp. 295, 347 US 521. The careful examination made by Judge Friendly of petitioner's extremely flimsy evidence in connection with the hearsay point (pet. 21-4) illustrates

from only one aspect of the case, the deficiencies of proof which characterized petitioner's presentation at the trial. These deficiencies would continue to support judgment for the respondent even if petitioner's theory of damages were accepted.

Conclusion

The petition is without merit and the writ should be denied.

Respectfully submitted,

THEODORE KIENDL
RALPH M. CARSON
Attorneys for Respondent
1 Chase Manhattan Plaza
New York 5, N. Y.

ROBERT D. SALINGER
LOUIS L. STANTON, JR.
Of Counsel

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v.

UNITED SHOE MACHINERY CORPORATION,
RESPONDENT.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI

JAMES M. MALLOY
10 State Street
Boston 9, Massachusetts
Attorney for Petitioner

RICHARD A. SULLIVAN
RALPH WARREN SULLIVAN
MALLOY, SULLIVAN & MYERSON
Of counsel

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RESPONDENT.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

This Court denied the petition of Herman Schwabe, Incorporated for a Writ of Certiorari to the Court of Appeals for the Second Circuit on April 30, 1962.

The judgment of the Court of Appeals sought to be reviewed affirmed the action of the United States District Court for the Eastern District of New York in directing a jury verdict in favor of respondent and in entering a judgment *dismissing petitioner's complaint against respondent.*

Petitioner's complaint had charged respondent with monopolizing the interstate shoe machinery industry in

violation of Section 2 of the Sherman Act to petitioner's injury and damage. In that regard, petitioner sought to introduce a decree finding respondent guilty of such a monopolization entered in *United States* v. *United Shoe Machinery Corporation* (D. Mass., 1953) 110 F. Supp. 295, aff'd. 347 U.S. 521. Petitioner's proffer of the decree was denied by the District Court.

Although petitioner made several assignments of error concerning various rulings of the District Court, the Court of Appeals declined to rule on any save those relating to petitioner's theory of damages and the District Court's exclusion of evidence as to that issue. 297 F.2d 906, 908. It may, therefore, fairly be inferred that the Court of Appeals assumed respondent's monopolization and impact therefrom on petitioner. It is also fair to say that the Court of Appeals affirmed solely and entirely on the damage question.

It would seem to be inevitable that an active competitor, such as the record shows petitioner to be, would suffer damages in the face of a monopolization. By definition, a monopolization consists of the power to exclude coupled with either the exercise of that power or the intent to exercise it. *United States* v. *Griffith*, 334 U.S. 100. In *United States* v. *United Shoe Machinery Corporation*, 110 F. Supp. 295, 343, it was ruled that respondent herein exercised that power.

Be that as it may, petitioner was prevented by the District Court from making a proof of damages which met the tests favored by this Court in such cases as *Bigelow* v. *RKO Radio Pictures, Inc.* 327 U.S. 251, 264, 265.

Petitioner attempted to introduce a comparison between its sales of clicking machines to shoe manufacturers and its sale of the same machines to manufacturers of non-shoe products. This was a rational and fair procedure. The respondent monopolized the distribution of clicking

machines to shoe manufacturers; it did not monopolize the distribution of clicking machines to non-shoe manufacturers. It would have been proper for the jury to infer that absent United's monopolization, petitioner would have done as well with its clicking machine business in the shoe trade as it did in the outside trade. It would also have been fair for the jury to take one step further and to have concluded that petitioner would have done as well with the sale of its other machine types to the shoe trade as it did in clicker sales to the outside trade, if it had not been for respondent's monopolization.

When the Court of Appeals refused that approach to petitioner, it rendered a decision in direct conflict with *Richfield Oil Corp.* v. *Karseal Corp.* (C. A. 9, 1959) 271 F.2d 709, 713, 714.

More importantly for the purposes of this Petition for Rehearing, however, the decision of the Court of Appeals may prove to be in conflict with a decision about to be rendered by this Court in *Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, No. 304, October Term, 1961.

Petitioner has been advised that *Continental Ore* was argued before this Court on April 17, 1962. Through Potter's Service and beginning on April 23, 1962 petitioner has received and examined the briefs filed by the parties in that case. It has been noted that the respondents in *Continental Ore* have placed some reliance upon the opinion of the Court of Appeals in this *Schwab* matter. We also point out that both cases involve similar rulings on similar damage questions.

However, the most significant feature of *Continental Ore* so far as we are concerned is that there also the courts below refused to allow evidence as to the business done by the petitioner in an outside or non-monopolized field. (Petitioner's Reply Brief, 25, 26). We submit that the position taken on that score by the petitioner in *Continental Ore*

is a valid position. Nevertheless, we should point out that there the comparative evidence offered dealt with different products, vanadium and fluorspar.

In this case, petitioner offered a comparison between free and restricted sales of the very same product performing the same function in both cases, clicking machines.

We contend that petitioner here should be entitled to a rehearing on this case standing alone. Furthermore, if this Court should order a reversal in *Continental Ore*, then necessarily a Writ of Certiorari should issue in this case.

Respectfully submitted,

James M. Malloy
10 State Street
Boston 9, Massachusetts
Attorney for Petitioner

Richard A. Sullivan
Ralph Warren Sullivan
Mallory, Sullivan & Myerson
Of counsel

Certificate

I, James M. Malloy, one of counsel for petitioner, hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay; and that the petition is restricted to a substantial ground available to petitioner but not previously presented and to an intervening circumstance of substantial effect.

(s) James M. Malloy
Attorney for Petitioner